2008

Truong v. Holmes : Brief of Appellant

Utah Court of Appeals

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
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STATEMENT OF JURISDICTION

Jurisdiction is appropriate in this case pursuant to UCA §78-2-2 and UCA §78-2-2(4).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the trial Court erred in dismissing plaintiff's claim of fraud in the inducement on the premise, it failed to state a cause of action upon which relief could be granted.

Determinative law:

Lloyd's Unlimited v. Nature's Way Marketing, Ltd., 753 P.2d 507 (Utah App. 1988).
Nielsen v. Hefferon, 1999 WL 33244735 (Utah App. 11/04/1999).
Ong Intel. v. 11th Ave. Corp., 850 P.2d 447 (Utah 1993).
Williams v. State Farm Ins. Co., 656 P.2d 966 (Utah 1992).

Standard of review:

In reviewing an Order of Dismissal pursuant to Rule 12(b)(6) the court accepts the material allegations in the Complaint as true and interprets those facts and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff as the non-moving party. The appellate court reviews the grant of a Rule 12 (B)(6) motion for correctness, ceding no deference to the district court.

Moss v. Pete Suazo Utah Athletic Commission, 175 P.3d 1042 (Utah 2007).

II. Whether the trial Court erred in dismissing plaintiff's claim of fraud in the inducement on the premise, it failed to state a cause of action upon which relief could be granted.

Determinative law:

Anderson v. Brinkerhoff, 756 P.2d 95 (Utah App. 1988).

Cache County v. Beus, 978 P.2d 1043 (Utah App. 1999).
Commercial Investment corp. v. Siggard, 936 P.2d 1105 (Utah App. 1997).
Creer v. Thurman, 581 P.2d 149 (Utah 1978).
Foundation Development Corp. v. Loehman's Inc., 163 Ariz. 438, 788 P.2d 1189 (1990).
Knighton v. Bowers, WL 797560 (Utah App. 4/15/04).
U-Beva Mines v. Toledo Mining Co., 24 Utah 2d 351, 471 P.2d 867 (1970).

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Moss v. Pete Suazo Utah Athletic Commission, 175 P.3d 1042 (Utah 2007).

The Appellate court reviews a trial court's grant of summary judgment for correctness, according no deference to the trial court's legal conclusions. In so doing the Court views the facts and all reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party.

Shaw Res. Ltd., LLC v. Pruitt, Gushee & Bachtell, P.C., 142 P.3d 560 (Utah App. 2006).

III. Whether the trial Court erred in dismissing plaintiff's claim of fraud in the inducement on the premise, it failed to state a cause of action upon which relief could be granted.

Determinative law:

Bellon v. Malnar, 808 P.2d 1089 (Utah 1991).

Hutcheson v. Gleave, 632 P.2d 815 (Utah 1981).
Nielsen v. Gold's Gym, 78 P.3d 600 (Utah 2003).
Ong Intel. v. 11th Ave. Corp., 850 P.2d 447 (Utah 1993).
Perkins v. Spencer, 121 Utah 468, 243 P.2d 446 (1952).
Smith v. Grand Canyons Expedition Company, 84 P.3d 1154 (Utah 2003 (reh. den. 2004).
Young Electric Sign Co. v. United Standard West Inc., 755 P.2d 162 (Utah 1988).

Standard of review:

In reviewing an Order of Dismissal pursuant to Rule 12(b)(6) the court accepts the material allegations in the Complaint as true and interprets those facts and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff as the non-moving party. The appellate court reviews the grant of a Rule 12 (B)(6) motion for correctness, ceding no deference to the district court.

Moss v. Pete Suazo Utah Athletic Commission, 175 P.3d 1042 (Utah 2007).

IV. Whether the trial court erred in finding there were no material issues of disputed fact precluding defendant's summary judgment on their counterclaim.

Determinative law:

Neiderhouser Builder & Dev. Corp. v. Campbell, 824 P.2d 1193 (Utah App. 1992).

Standard of review:

In determining whether the trial court correctly found that there was no genuine issue of material fact, the Appellate court views the facts and all reasonable inferences in a light most favorable to the party opposing the motion.

It reviews the trial court's conclusions of law for correctness, including its conclusion that there are no material fact issues.

Neiderhouser Builder & Dev. Corp. v. Campbell, 824 P.2d 1193 (Utah App. 1992).

V. Whether the trial court erred in holding that defendants were entitled to summary judgment on their counterclaim for unlawful detainer and landlord's remedies as a matter of law.

Determinative law:

UCA §78-36-1
Anderson v. Brinkerhoff, 756 P.2d 95 (Utah App. 1988).
Bellon v. Malnar, 808 P.2d 1089 (Utah 1991).
Cache County v. Beus, 978 P.2d 1043 (Utah App. 1999).
Commercial Investment corp. v. Siggard, 936 P.2d 1105 (Utah App. 1997).
Creer v. Thurman, 581 P.2d 149 (Utah 1978).
Foundation Development Corp. v. Loehman's Inc., 163 Ariz. 438, 788 P.2d 1189 (1990).
Hutcheson v. Gleave, 632 P.2d 815 (Utah 1981).
Knighton v. Bowers, WL 797560 (Utah App. 4/15/04).
Lloyd's Unlimited v. Nature's Way Marketing, Ltd., 753 P.2d 507 (Utah App. 1988).
Nielsen v. Gold's Gym, 78 P.3d 600 (Utah 2003).
Nielsen v. Hefferon, 1999 WL 33244735 (Utah App. 11/04/1999).
Ong Intel. v. 11th Ave. Corp., 850 P.2d 447 (Utah 1993).
Perkins v. Spencer, 121 Utah 468, 243 P.2d 446 (1952).
Ravarino v. Price, 123 Utah 559, 260 P.2d 570 (1953).
Smith v. Grand v. Grand Canyons Expedition Company, 84 P.3d 1154 (Utah 2003) (reh. den. 2004).
Spears v. Warr, 44P.3d 742 (Utah 2002).
U-Beva Mines v. Toledo Mining Co., 24 Utah 2d 351, 471 P.2d 867 (1970).
Williams v. State Farm Ins. Co., 656 P.2d 966 (Utah 1992).
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The appellate court reviews a trial court's grant of a summary judgment for correctness, according no deference to the trial court's legal conclusions. In so doing, the court views the facts and all reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party.

Shaw Res. Ltd, LLC v. Pruitt, Gushee & Bachtell, P.C., 142 P.3d 560 (Utah App. 2006).

VI. Whether the trial court erred in calculating the amount of damages purportedly owing to the defendants.

Determinative law:

Utah Code Ann. § 78-36-10
Angelos v. First interstate Bank of Utah, 671 P.2d 772 (Utah 1993).
Forrester v. Cook, 292 P. 206 (Utah 1930).
Smith v. Linmer Energy Corp., 790 P.2d 1222 (Utah App. 1990).
Veli Convalescent and Care Institutions v. Division of Healthcare Fin., 797 P.2d 438 (Utah App. 1990).

Standard of review:

The appellate court reviews a trial court's grant of a summary judgment for correctness, according no deference to the trial court's legal conclusions. In so doing, the court views the facts and all reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party.

Shaw Res. Ltd, LLC v. Pruitt, Gushee & Bachtell, P.C., 142 P.3d 560 (Utah App. 2006).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Copies of all determinative constitution provisions, statutes and rules are attached hereto as Addendum "B".

STATEMENT OF THE CASE

This action was initiated by the Plaintiff with the filing of a Complaint on September 30, 2004. R. 1. Holmes filed a motion to dismiss the Complaint on October 25, 2004.R.23. A hearing on the motion took place on April 28, 2005. R. 1549. According to the docket sheet, on June 29, 2004 Judge Lewis signed an order "re: hrg on 4/28/05, The Court dismisses the pla's claims for specific performance and promissory estoppel & permitting pla to amend his unjust enrichment claim or to add a new claim". R.171.

An amended Complaint was filed on August 1, 2005 and Defendants filed a Motion to Dismiss on August 23, 2005. R.173, R. 197. On August 26, 2005 Defendants left an Answer and Counterclaim with the Court. R.201. The Defendants however failed to pay the required filing fee and the Answer and Counterclaim were accordingly not "filed" until September 27, 2005. Mr. Truong's answer to the Counterclaim was filed the same day. R.394. On November 7, 2005 Holmes filed a Motion for Partial Summary Judgment and Motion for Attachment in aid of lessor's lien. R.501, R.505.

On February 1, 2006 the Court heard oral argument on the Defendants' Motion to Dismiss, Motion for Partial Summary Judgment and Motion for Attachment. R. 1550. At the conclusion of the hearing the Court indicated Mr. Truong's personal property was

subject to attachment and took the remaining matters under advisement. R.1550 pg 40. On March 13 Plaintiff posted a cash bond of $150,000.00, with the Court, to effectuate a release of any claim of a landlord's lien, and filed a motion requesting the Court to establish the correct amount of the bond. Defendants opposed that motion. R.589. On April 5, 2006 the Court entered a minute entry wherein it stated it was granting Defendants' Motions for Partial Summary Judgment and for a Writ of Attachment and ordering Defendants' counsel to prepare an Order reflecting the Court's ruling. R.600.

On May 31, 2006 the property was completely vacated and surrendered to the Defendants. In July of 2006, Holmes sent a proposed order to Plaintiff. On July 12, 2006 Plaintiff objected to the form of the proposed order. R.670. On August 31, 2006 Defendants filed a Motion for Summary Judgment on Supplemental Damages. R.751. After the hearing two separate orders, one dealing with an award of damages, the other with an award of costs and attorney fees, were entered by the court. R.1022, R.1038. The cost and attorney fees judgment was actually entered one day prior to the judgment itself.

The Plaintiff filed a motion for summary judgment seeking resolution of the remaining claims in defendant's counterclaim against plaintiff. R. 1174. At the hearing on the motion, the defendants informed the court that they no longer desired to pursue those two claims and the Court accordingly dismissed them, and as there were no longer any claims present, denied Plaintiff's motion for summary judgment as moot R.1552.

The court's final order was dated March 21, 2008 and entered March 24, 2008.

R.1449. Thereafter this appeal was filed April 17, 2008. R.1538.

STATEMENT OF RELEVANT FACTS

7. In September of 2003, the Plaintiff, Mr. Truong, was approached by a realtor named Jack Carnell to see if he was interested in acquiring a building located at 1050 South State Street, Salt Lake City, Utah. Complaint. R.831.

8. Mr. Truong was informed that the owners of the property were the Defendants Bruce and Joan Holmes. R.831.

9. The building was in a dilapidated condition and was otherwise unsuitable for Truong's purposes, but the location was desirable. R.831

10. The Holmes had been attempting to sale the premises or to lease it at the rate of $3,500.00 per month. R.831.

11. After a period of negotiations, the parties agreed upon a sale of the property to Mr. Truong. R.832.

12. After the parties had agreed upon the sale, the Holmes determined that they needed to defer the timing of the sale in order to obtain more favorable capital gains treatment and to resolve issues pertaining to tax liens that were present on the property. R.832.

13. Mr. Truong was willing to work with the Holmes to allow them to achieve their goals. R.832.

14. To that end the realtor Mr. Carnell hired an attorney to prepare documents consisting of a lease and option agreement. R.832.

15. When Mr. Truong asked about the lengthy agreements he was informed that the agreements were mere formalities necessary to meet the IRS criteria and that the boiler

plate provisions would not be enforced. R.832.

16. At all times it was the intent and understanding of the parties that Mr. Truong was a "tenant" only as a formality and that the Holmes would sell the property to him at the end of September 2004. R.832.

17. The parties signed the lease and option agreements at the end of September 2003. R.832.

18. At or about the time of execution, Mr. Truong paid the Holmes $90,000.00 consisting of two checks designated as rent of $60,000.00 and a security deposit of $30,000.00. R.832.

19. Both of these amounts were to be credited towards the purchase price. R.832.

20. At this time Mr. Carnell was paid a real estate commission for the sale of the property. R.832.

21. During the negotiations for the sale of the property and for periods of time thereafter, Mr. Truong and Mr. Holmes discussed the renovations Mr. Truong was going to make to the property. R.832.

22. The renovations included the complete gutting of one structure, down to the four walls, and substantial modification to the adjoining office R.832.

23. Mr. Holmes was aware that Mr. Truong was going to spend hundreds of thousands of dollars to upgrade the property from a dilapidated structure to an attractive and viable retail, office and warehouse space. R.832-833.

24. After the Agreements were in place, Holmes made a demand that Mr. Truong get insurance in place on the property. R.833.

25. Mr. Truong had attempted obtain insurance on the property, but had been unable to procure any due to the dilapidated condition the property was in when it was turned over

to him. R.833.

26. Mr. Truong spent over $190,000.00 on renovations to the property. R.833.

27. The parties thereafter agreed that the policy of insurance the Holmes had on the property would be continued, but that Mr. Truong would pay for that insurance. R.833.

28. In January of 2004 Holmes sent a letter to Mr. Truong demanding payment for the insurance policy. At that time Mr. Truong was out of the country. R.833.

29. Prior to leaving the country, Mr. Truong had authorized his brother, Andy Truong to act on his behalf. Andy Truong, on behalf of Mr. Truong sent a check to Holmes for the insurance along with a letter notifying Holmes of Mr. Truong's intent to exercise the option to purchase the building. R.833, R. 837.

30. Holmes admits to receiving the check for the insurance.

31. Thereafter there was little to no communication between the parties until Holmes sent a letter on or about August 19, 2003, to Mr. Truong, alleging that Truong had failed to send a Notice of intent to exercise the option to Holmes within sixty days of the exercise date, as required under the Option Agreement. R.834.

32. Mr. Truong immediately contacted Holmes and their counsel and informed them he was ready to close on the date contained within the contract. R.834.

33. Mr. Truong also contacted the attorney who had drafted the lease and option agreements and had him contact the Holmes counsel and again affirm Mr. Truong's ability and intent to close the transaction. R.834

34. Holmes rejected Mr. Truong's offer to close. R.834.

35. This rejection led to the initial action in this case which was filed with the Court on

September 30, 2004. R.1.

SUMMARY OF THE ARGUMENT

This case consists of three separate and distinct areas of contention, dismissal of the amended complaint under Rule 12(b)(6), the granting of summary judgments on defendant's counterclaims, pursuant to Rule 56, and the amount of damages awarded to the defendants as a result of the granting of the two motions.

In order to defeat a motion to dismiss under Rule 12(b)(6) the party opposing the motion need only show that he would be entitled to recover under some version of the facts. That de minimus threshold is more than adequately met in this case.

Plaintiff's Amended Complaint set forth three causes of action. The Plaintiff plead facts sufficient to meet all three causes. Defendants sought to avoid this fact by alleging they have affirmative defenses that will defeat the claims in the complaint. The test under Rule 12(b)(6) does not however allow a venture into purported affirmative defenses. The issue is solely whether the "Complaint" states a cause of action on which relief could be granted. Even if the court were to have looked at the "affirmative defenses" the facts as plead by the Plaintiff, if accepted as true as required by the rule, still defeat those purported defenses. The trial court's ruling dismissing the amended complaint was incorrect and has created a serious injustice.

Summary Judgment is only available where there are no disputed issues of material fact and the party moving for summary judgment is entitled to judgment as a matter of law. *Snyder v. Merkley*, 693 P 2d. 64 (1984). Only where it clearly appears that the party against whom the judgment would be granted can't possible establish a right to recover should summary judgment be granted, and any doubt should be resolved in favor of such a party when summary judgment

against him is being considered. *Reliable Furniture Company v. Fidelity and Guarantee Insurance Underwriters*, 16 Utah 2d. 211, 398 P 2d. 685 (1965). In considering a motion, the court must "view the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party." *Carrier v. Salt Lake County*, 104 P.3d 1208 (Utah 2004). It only takes one sworn statement to dispute averments on the other side of a controversy and create an issue of fact, precluding summary judgment. *Holbrook Company v. Adams*, 542 P 2d. 191 (1975).

Summary Judgment was given to the Defendants in this matter based upon an acceptance of the Defendants' affirmative defenses to Plaintiff's Amended Complaint. If Plaintiff is entitled to purchase the property, he cannot be held to be in unlawful detainer thereof. The dismissal of the Amended Complaint is therefore inextricably related to the grant of summary judgment. Reversal of the dismissal accordingly requires the reversal of the summary judgment as well.

Examining the affirmative defenses discloses that Plaintiff plead facts, which if accepted as true, would defeat the affirmative defenses. These facts were set forth in sworn affidavit form. Pursuant to Rule 56 the trial court was accordingly obligated to deny the summary judgment motion, but it failed to do so.

Examining the argument of the Plaintiff, it likewise becomes clear that neither the Defendants or the trial court addressed the equitable relief requested by the plaintiff. This relief consists in part of the "Doctrine of Substantial Compliance" which has been accepted by Utah Courts and which, by its very nature, creates a jury question not susceptible to determination through summary judgment.

Finally the plaintiff pointed out that where a party seeks a forfeiture that party must

comply strictly with the provisions which it seeks to enforce. As demonstrated by the Plaintiff, Defendants failed to comply with the very agreements under which they seek to cheat the Plaintiff. As a matter of law that result should not be confirmed.

ARGUMENT

I. THE TRIAL COURT IMPROPERLY DISMISSED PLAINTIFF'S COMPLAINT.

A. Standard of Review

Motions for judgment on the pleadings are not favored by the courts, and when made great liberality in construing the assailed pleading should be allowed. *Harman v. Yeager*, 100 Utah 30, 110 P.2d 352 (1941). A motion to dismiss for failure to state a claim challenges a plaintiff's entitlement to relief under the facts alleged or under any state of facts that could be proved to support the claim. *Patterson v. American Fork City*, 67 P.3d 466 (Utah 2003). If there is any doubt about whether a claim should be dismissed for lack of factual basis, the issue should be resolved in favor of giving the party an opportunity to present its proof. *Ho v. Jim's Enterprises, Inc.*, 29 P.3d 633 (Utah 2001). In ruling on a motion to dismiss for failure to state a claim, a court must construe the claims in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor. *Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055 (Utah 1991). When viewed in light of these standards, the court's dismissal of the complaint is plainly in error.

B. THE AMENDED COMPLAINT STATES SUFFICIENT FACTS TO SUPPORT ALL OF ITS CLAIMS FOR RELIEF.

Plaintiff's Amended Complaint sets forth three causes of action, which are plead in the alternative. The Claims are for Fraud in the Inducement, Specific Performance and Unjust

Enrichment. All Plaintiff is seeking is the enforcement of the actual bargain between the parties as opposed to Defendants attempt to exploit what they obviously view as a loop hole allowing them to take outrageous advantage of the Plaintiff. As will be shown below, the Amended Complaint sets forth adequate facts to support all three causes of action.

1. The Complaint Sets Forth Adequate Facts To Show Fraud in the Inducement.

As set forth in the Amended Complaint, the parties entered into a Real Estate Purchase Contract. At Defendant's request, Plaintiff did not close the transaction under the terms in the REPC, but instead deferred the acquisition of the property for one year. That deferral, and surrender of the right to immediate ownership, was made in the reasonable reliance that Plaintiff would receive title to the property the next year. Plaintiff has specifically averred that he was told, prior to executing the lease and purchase option, by the Defendants, that the lease and purchase option were a mere formality and that the boiler plate provisions of the documents would not be enforced. See Amended Complaint ¶29.

In reliance on that promise, Plaintiff spent Hundreds of Thousands of Dollars renovating the property for his use. After the Defendants received $90,000.00 in cash and the property itself had been vastly improved, they sought to keep all the money and the property too. With the trial court's grant of summary judgment on Defendants' counterclaim they were awarded an even greater cash windfall for their bad faith actions.

Defendants alleged that the claim for fraudulent inducement was not plead with sufficient specificity. That simply is not true. The allegations in the Amended Complaint set forth the specific misrepresentations that were made, that they were made by the Defendants, that they were made prior to execution of the contracts at issue and that the Plaintiff relied upon those

representations both in the manner in which he upgraded the property and in the manner in which he followed the dictates of the boiler plate in the agreements. The purpose of the pleading rules is to afford the parties fair notice of the nature and basis or grounds of the claim being made. *Williams v. State Farm Ins. Co.*, 656 P.2d 966 (Utah 1982). Plaintiff's Amended Complaint far exceeds the basics required.

Defendants next argued that a fraud in the inducement claim is barred because the agreements they fraudulently induced Plaintiff to sign contain language precluding the introduction of parol evidence of those misrepresentations. This very issue was addressed by the Utah Court of Appeals in *Nielsen v. Hefferon*, 1999 WL 33244735 (Utah App. 11/4/1999). In that case the Court held: "Moreover, parol evidence is admissible to prove that a party was induced into a contract by fraud, despite a determination that a writing is an integrated contract."

In addressing this issue the Court has also held " An integration clause may prevent enforcement of prior or contemporaneous agreements on the same subject, but "does not prevent proof of fraudulent representations by a party to the contract, or of illegality, accident, or mistake...Paper and ink possess no magic power to cause statements of fact to be true when they are actually untrue." *Lloyd's Unlimited v. Nature's Way Marketing, Ltd.*, 753 P.2d 507, 512 (Utah App. 1988).

The Court of Appeals defined the types of mistake it was referring to:

> First, if the instrument does not embody the intentions of both parties to the contract, a mutual mistake has occurred, and reformation is appropriate. Second, if one party is laboring under a mistake about a contract term and that mistake either has been induced by the other party or is known by and conceded to by the other party, then the inequitable nature of the other party's conduct will have the same operable effect as a mistake...

Lloyd's Unlimited at 512.

In determining the effect of the misrepresentations, the court may choose to invalidate only those portions of the agreement that are problematical as a result of the fraudulent inducement. In the instant case, the Court need only hold that the nonessential terms of the contract such as the timing of the notice of intent to exercise the option, the bonding requirements etc. are not enforceable. There would still exist sufficient written agreement between the parties as to the property to be sold, the parties to the transaction, the price and the time the transaction was to close. Consequently Defendants concerns with the statute of frauds are eliminated.

This case is distinguishable from the cases, cited by Defendants to the trial court, because it involves a series of written agreements between the parties. The only necessity is for the Court to determine what the actual terms were to be and to do that the Court is supposed to consider fraud in the inducement and the parol evidence that establishes the claim.

2. Plaintiff's Complaint Sets Forth Sufficient Facts For A Claim For Specific Performance.

"[R]eal property is assumed to be unique for purposes of specific performance and ... specific performance is the presumed remedy for the breach of an agreement to sell real property." *Knighton v. Bowers*, WL 797560 (Utah App. Apr. 15, 2004). In its initial Complaint, Plaintiff sought to rely on the parties intent and Plaintiff's oral affirmation of his exercise of the option. The Defendant's moved to Dismiss the original complaint arguing the contracts between the parties were unambiguous and integrated and that they required notice of intent to exercise the option to be made in writing.

After oral argument on the motion, but prior to the court's ruling, Plaintiff discovered a

writing that gave notice of the intent to exercise the option. That writing, which was not addressed by the Court in its prior ruling, forms the basis of the claim for specific performance here.[1]

Defendants raise several objections to the use of the letter to exercise the option. The first objection is that the Option could not be exercised because the Plaintiff was in Default under the terms of the lease. The purported defaults consisted of failing to place insurance on the property, the Plaintiff's alleged making of unauthorized improvements on the property, Plaintiff's failure to obtain a performance and completion bond, and Plaintiff's failure to pay the real property taxes.

[1] A copy of the letter is attached as Exhibit "C" to the amended Complaint.R.196.

Paragraph 10. Of the lease required the Defendant to give written notice of any alleged default in the lease before it could take any legal action based thereon. Prior to the letter exercising the option, the only written notice of default was with respect to the insurance. R.42-43. That alleged defect was cured at the time the letter exercising the option was sent. The letter contained the demanded payment and the insurance would have been in place for a period of time past the exercise date.[2]

Paragraph 3 of the Option Agreement provides in pertinent part "Notwithstanding anything else herein, this option may not be exercised while there exists any uncured **material** default under the "Lease" which is attached to this Option Agreement as an Exhibit" (emphasis added). R.55. "Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in light of all the circumstances when they executed the contract." *Creer v. Thurman*, 581 P.2d 149, 151 (Utah 1978)

The Construction is complete. There is no need for a bond. Furthermore, if Defendants had closed as they agreed, any need for such a bond would have been completely obviated. The bond provision is clearly not "material" in a fashion that would have prevented the exercise of the Option. The bond is simply a mechanism to protect the property owner from mechanic's lien claims and or waste to the property. With the transfer of ownership to the Plaintiff, all such risk would have passed to him as well.

[2] It is important to note that the Defendants cashed the check accompanying the letter which cured the purported default relating to the insurance.

The Defendants knew exactly what construction Plaintiff was undertaking on the property. Even after the construction was complete no objection was made as to the scope or nature of the renovations. It is only when the Defendants look to find a way to reap an unjust windfall by keeping the property that they first raise this issue as an excuse for their failure to perform.

With respect to the property taxes, again the taxes would not have become due for 2004 until after transaction would have closed. If the transaction closed, responsibility for payment of the taxes would have fallen solely on the owner of the property. Therefore performance of this condition, even if there had been proper notice of default, was not a "material" breach.

The Defendants' failure to insist on adherence to the precise terms of the contract, combined with their failure to give any notice of their intention to insist on strict compliance with the terms of the contract, is ample evidence that they waived strict compliance with the contractual terms. *Anderson v. Brinkerhoff*, 756 P.2d 95, 98 (Utah App 1988).

The second objection to the exercise of the option is that it constitutes an improper modification of the agreements, because of its reference to other conversations between the parties. This argument is irrelevant for purposes of the specific performance claim. That claim is simply that the letter comprises the required notice under paragraph 3 of the Option.

The third complaint is that he exercise of the option fails under the statute of frauds because it is unsigned. This argument is specious. The original of the document was signed and sent to the Defendants. The document attached to the Amended Complaint is a copy because the original is in the possession of the Defendants. The letter was signed. Furthermore the letter does not in and of itself transfer any real property. It simply states that Plaintiff is willing and

able to perform under the terms of the option when and if the Defendants can perform.

The next complaint is that the Amended Complaint does not contain an allegation that Andy Truong was authorized to exercise the option. It is not required that a Complaint speculate as to each and every affirmative defense or counter allegation that will be made by a Defendant. It is sufficient that it provide adequate notice of the claims that are being made. Andy Truong was authorized by a writing to act on David Truong's behalf. R.833. During this period of time David Truong was traveling outside the country. Prior to leaving he authorized his brother to act on his behalf. R.833.

The final complaint is that the letter does not exercise the option. Paragraph 3 of the Option Agreement simply requires notice of intent to pay the purchase price within the Option Exercise period. The letter does exactly that. The actual exercise of the option would have taken place at the later date, but the Defendants refused to fulfill their obligations to close.

3. Plaintiff's Amended Complaint Sets Forth The Necessary Facts For A Claim of Unjust Enrichment.

> "A proper claim for unjust enrichment requires that the party show (1) a benefit conferred on one person by another, (2) an appreciation or knowledge by the conferee of the benefit, and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value."

Smith v. Grand Canyon Expeditions Company, 84 P.3d 1154,1162 (Utah 2003)(reh den. 2004),

In this case Defendants received a benefit from the Plaintiff on three different levels. The first benefit is in the initial money received from the Plaintiff totaling $90,000.00. The Second benefit was in the dramatic improvement of the property through the construction of hundred of thousands of dollars of improvements. The final benefit was conferred through the trial court's award of rents and unlawful detainer damages.

The Defendants knew of the receipt of the cash and know of the value of the improvements, which has fueled their attempt to cheat the Plaintiff. Under the facts of this case it would clearly be inequitable for Defendants to receive this windfall without paying for it.

Defendants argue that because leasehold improvement were governed under the Lease, there can be no claim for unjust enrichment. This is not true. The clauses cited by Defendants equate to a liquidated damages clause. When the enforcement of a "forfeiture provision would allow an unconscionable and exorbitant recovery, bearing no reasonable relationship to the actual damage suffered, it becomes unenforceable," *Hutcheson v. Gleave*, 632 P.2d 815, 817 (Utah 1981). *See Also Perkins v. Spencer*, 121 Utah 468, 243 P.2d 446 (1952): *Young Elec. Sign Co. v. United Standard West, Inc.*, 755 P.2d 162, 164 (Utah 1988); *Bellon v. Malnar*, 808 P.2d 1089, 1096 (Utah 1991).

Furthermore, for a contract to bar damages under quantum meruit it must be an "enforceable contract" regarding the subject matter. The first key element required in establishing a contract is a meeting of the minds. *Nielsen v. Gold's Gym*, 78 P.3d 600, 602 (Utah 2003) ("It is fundamental that a meeting of the minds on the integral features of an agreement is essential to the formation of a contract.") Plaintiff's view is that the option and lease agreement, as drafted, constituted a mere accommodation to the Defendants to allow them favorable tax benefits by deferring the closing on the property. Defendants now claim that the option and lease agreement are "integrated" contracts abrogating their obligation to sell to the Plaintiff under the terms of the REPC. If this was Defendants' belief at the time of the execution of the documents

there was no meeting of the minds and there was no contract at all. *Id.*[3]

The existence of a written document, purporting to be an integrated agreement and appearing to be valid on its face, does not constitute a valid contract even where drafted by the party alleging the agreement to be invalid if the party is fraudulently induced into entering into the agreement. *Ong International (U.S.A.) Inc. v. 11th Avenue Corp.*, 850 P.2d 447 (Utah 1993). Here the Plaintiff was induced to surrender his rights to immediate title and possession of the property, pursuant to the REPC, in return for a promise that he would be able to get such possession in the following year. He was led to believe that the option and lease agreement were merely accommodations for the benefit of the Defendants. If such is the case he should be allowed to buy the property if such is not the case then the representations were fraudulent and the option and lease agreement are void.

Because the provisions themselves are unenforceable the Court can and should consider the considerable unjustified windfall reaped by the Defendants.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

A. Standard of Review

Summary Judgment is only available where there are no disputed issues of material fact and the party moving for summary judgment is entitled to judgment as a matter of law. *Snyder v. Merkley*, 693 P 2d. 64 (1984). Only where it clearly appears that the party against whom the

[3] In the alternative the Court could reform the contract to meet the parties intentions allowing Plaintiff to purchase the property. *Lloyd's Unlimited v. Nature's Way Marketing, Ltd.*, 753 P.2d 507, 511 (Utah App. 1988).

judgment would be granted can't possible establish a right to recover should summary judgment be granted, and any doubt should be resolved in favor of such a party when summary judgment against him is being considered. *Reliable Furniture Company v. Fidelity and Guarantee Insurance Underwriters*, 16 Utah 2d. 211, 398 P 2d. 685 (1965). In considering a motion, the court must "view the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party." *Carrier v. Salt Lake County*, 104 P.3d 1208 Utah 2004). It only takes one sworn statement to dispute averments on the other side of a controversy and create an issue of fact, precluding summary judgment. *Holbrook Company v. Adams*, 542 P 2d. 191 (1975). Where the party making the motion does not support his or her motion with competent sworn testimony or other admissible evidence, the party opposing the motion is entitled to rely on his contradictory pleadings. *Parrish v. Layton City Corp.*, 542 P.2d 1086 (Utah 1975).

B. Issues of Material Fact Preclude Granting Summary Judgment.

In determining whether the trial court correctly found that there was no genuine issue of material fact, the Appellate court views the facts and all reasonable inferences in a light most favorable to the party opposing the motion. It reviews the trial court's conclusions of law for correctness, including its conclusion that there are no material fact issues. *Neiderhouser Builder & Dev. Corp. v. Campbell*, 824 P.2d 1193 (Utah App. 1992).

The Defendants' arguments in favor of their original Motion for Summary Judgment rely on affirmative defenses made in opposition to the Amended Complaint. As will be demonstrated below there exist issues of material fact precluding a finding in

favor of these defenses.

1. Statute of Frauds

While the Statue of Frauds requires contracts for the sale of land to be in writing, exceptions to the Statute exist where there has been part performance. *Spears v. Warr*, 44 P.3d 742, 751 (Utah 2002). This argument was examined in detail by the Utah Supreme Court in *Ravarino v. Price*, 123 Utah 559, 260 P.2d 570 (1953). In *Ravarino* the Court stated:

> As stated by this court in Utah Mercur Gold Min. Co. v. Hershel Gold Min. Co., 103 Utah 249, 134 P.2d 1094, 1097, the policy considerations underlying the doctrines of part performance and estoppel are indistinguishable: " Whether the legal label given to the basis of the plaintiffs' claimed right to continue in possession of the property is equitable estoppel, irrevocable license, or an oral contract for a written extension taken out of the statute of frauds because of partial performance is not so important. These concepts are but forms designed to serve a more ultimate principle that no one shall induce another to act on promise of reward for such act and then after obtaining the benefit of the same repudiate the contract." The thesis is given further weight by this court in Bamberger Co. v. Certified Productions, Inc., 88 Utah 194 48 P.2d 489, 492: "As stated by Mr. Justice Cardozo, then justice of the Court of Appeals of New York, in Imperator Realty Co. v. Tull, 228 N.Y. 447, 127 N.E. 263,266: "Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. 'We need not go into the question of the accuracy of the description.' The truth is that we are facing a principle more nearly ultimate than either waiver or estoppel, one with roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. The statute of frauds was not intended to offer an asylum of escape from that fundamental principle of justice."

Ravarino at 574 FN1.

Plaintiff surrendered specific rights under the signed REPC agreement as a favor to the Defendants. Those rights were abandoned only on the specific promise that the property would be sold to Plaintiff in 2004. In reliance on that promise, Plaintiff entered

into the Lease agreement and made significant modifications and renovations to the property. Plaintiff's abandonment of existing rights and his substantial performance removes this case from the Statute of Frauds. Plaintiff set forth his position as to Defendants representations and his reliance thereon in his affidavit filed in opposition to the defendants' motion for summary judgment. Accepting those representations as true, as required when they are the representations of the party opposing a motion for summary judgment, the Plaintiff set forth a valid claim for relief under the doctrine of estoppel and his performance defeated the Holmes' defense of the Statute of Frauds.

2. Integration Clause

Defendants also sought to preclude any parol evidence relating to the parties intentions in entering into the lease and option agreement on the basis of the integration clause contained in the lease and option agreement entered into by the parties.

In *Nielsen v. Hefferon*, 1999 WL 33244735 (Utah App. 11/4/1999) the Court held: "Moreover, parol evidence is admissible to prove that a party was induced into a contract by fraud, despite a determination that a writing is an integrated contract."

In addressing this issue the Court has also held " An integration clause may prevent enforcement of prior or contemporaneous agreements on the same subject, but "does not prevent proof of fraudulent representations by a party to the contract, or of illegality, accident, or mistake...Paper and ink possess no magic power to cause statements of fact to be true when they are actually untrue." *Lloyd's Unlimited v. Nature's Way Marketing, Ltd.*, 753 P.2d 507, 512 (Utah App. 1988).

The Court of Appeals defined the types of mistake it was referring to:

> First, if the instrument does not embody the intentions of both parties to the contract, a mutual mistake has occurred, and reformation is appropriate. Second, if one party is laboring under a mistake about a contract term and that mistake either has been induced by the other party or is known by and conceded to by the other party, then the inequitable nature of the other party's conduct will have the same operable effect as a mistake...

Lloyd's Unlimited at 512.

In the instant case, Plaintiff set forth his understanding of the facts relating to the execution and effect of the agreements and their provisions in paragraphs 9-13 of his affidavit. Accepting those facts as true eliminated the defense of the integration clause, disputing those facts creates issues of material fact precluding summary judgment

.

C. Plaintiff Should Be Allowed to Purchase the Property under the Doctrine of Substantial Compliance.

Defendants position in this case is that in order for Plaintiff to acquire the property he needed, according to the agreement, to give notice of his intent to exercise the option sixty days prior to the exercise date and to be in full compliance with all terms of the lease at the time the notice was given. Defendants claim that notice was not given until the letter from Mr. Ziter, which would have been 30 days late, and that the letter was invalid anyway because Plaintiff was in violation of the lease agreement requiring maintenance of insurance, filing of a construction bond and payment of property taxes.

Plaintiffs position is that he gave oral representations that he was going to exercise the option to Mr. Holmes prior to the sixty day deadline, that written notice in the form of the letter from Andy Truong, Mr. Truong's brother was given prior to the sixty day period and further that delivery of the notice thirty days prior to the agreed upon closing date constituted substantial compliance. Defendants' argument results in a "forfeiture".

The Utah Court of Appeals addressed the issue of forfeitures in *Commercial Investment*

Corp., v. Siggard, 936 P.2d 1105 (UT App. 1997) there the Court stated: "We begin with the well established principles that although parties are free to contractually provide for an enforceable forfeiture provision forfeitures are not favored in the law. The undesirability of forfeiture is well-stated by the legal maxim that "the law abhors forfeiture". *Commercial Investment Corp.* at 1109 (citations omitted).

In *U-Beva Mines v. Toledo Mining Co.,* 24 Utah 2d 351, 471 P.2d 867 (1970) the Utah Supreme Court addressed an issue very similar to the one here at bar. U-Beva had entered into a lease agreement which contained a provision for the termination of the lease if there was a breach of any of the lease conditions which were not cured within sixty days of notice of the breach. U-Beva had failed to make a $95.00 tax payment. Toledo sent U-Beva notice of the breach. U-Beva failed to pay the tax until three weeks after the 60 day notice period had expired and Toledo claimed that under the terms of the lease the lease was therefore terminated.

> The Utah Supreme Court noted that although the payment was three weeks late, it would be inequitable to allow a forfeiture for a late payment of $95 when Toledo had already expended $55,000.00 pursuing other lease provisions. Specifically, the court held:
>
> We are constrained to believe, and so conclude, that in equity Toledo is relieved from any departure here on the grounds that the defection was so minor as to invoke the offices of equity, and that at law substantial compliance with the contract, under the circumstances, would purge an erstwhile default under a generally accepted policy against forfeiture, and that otherwise, there would be an unconscionability heretofore condemned by us, justifying the invocation of equitable principles restricting even the freedom of contracting improvidently. *U-Beva* at 869.

Cache County v. Beus, 978 P.2d 1043, 1048 (Utah App. 1999).

The Utah Court of Appeals cited with approval to the Arizona case of *Foundation Development Corp. v. Loehmann's, Inc.* 163 Ariz. 438, 788 P.2d 1189 (1990) where that court stated:

> An overwhelming majority of courts has concluded, without reference to a specific statutory provision, that a lease may not be forfeited for a trivial or technical breach even where the parties have specifically agreed that "any breach" gives rise to the right of

termination.

> These courts note the sophistication and complexity of most business interaction and are concerned, therefore, that the possibilities for breach of a modern commercial lease are virtually limitless. In their view, the parties to the lease did not intend that every minor or technical failure to adhere to complicated lease provisions could cause forfeiture. Accordingly nearly all courts hold that, regardless of the language of the lease, to justify forfeiture, the breach must be "material," "serious," or substantial."

Cache County at 1049-1050.

In order to determine whether a breach is "material" the Court of Appeals required reference to the Restatement (Second) of Contracts which states the fact finder should look at

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. Restatement (Second) of Contracts: Circumstances Significant in Determining Whether A Failure is Material § 241 (1981).

Cache County at 1050.

If the Court were to ignore the verbal notifications and the written notification of Andy Truong and accept only the notification sent by Mr. Ziter, a weighing of the factors in the Restatement clearly holds in favor of Mr. Truong. (a) The reasonable value the Holmes could expect from the contract was the option price. Irrespective of the delay in notice they would have received it in full. (b) By terminating the option Mr. Truong receives no compensation for the $190,000.00+ he spent in renovating the property, he received only the benefit of the time of the rental which, prior to Mr. Truong's renovations was $3,500.00 per month against his payment of $90,000.00 in rents and deposits. (c) The enforcement of the provision as requested by Defendants results in a complete forfeiture. (d) Mr. Truong, if he was previously in default, completely cured the default through Mr. Ziter's notice; and (e) There is no evidence that Mr.

Truong's actions were in any fashion failing to comport with standards of good faith and fair dealing.

The facts as presented provide a clear case for the granting of summary judgment to Plaintiff on this issue, at a bare minimum they create issues of material fact that should have been addressed by the jury.

D. Holmes Failure to Give Proper Notice Dooms Their Claims for Lease Termination.

In order to forfeit a purchaser's rights under a purchase contract, the seller must strictly comply with the notice provisions of the contract. *Commercial Investment Corp., v. Siggard*, 936 P.2d 1105, 1109 (Utah App. 1997). Under paragraph 10 of the lease, before a forfeiture can take place there must be a written notice of the breach to the breaching party, the notice must identify the breach with specificity, must identify what must be done to remedy the breach and must give the breaching party five days to remedy the breach. At the time Mr. Truong gave notice of his intention to exercise the option there were no outstanding breaches upon which notice had been given. Furthermore, the cure of any material breaches was only to take place prior to exercise of the option, not the notice of the option as Defendants have been arguing. Defendants "notices" of default under the lease were not served until long after the option would have been exercised. Accordingly they can provide no basis for denying Plaintiff the right to acquire the property.

III. DEFENDANTS ARE NOT ENTITLED TO THEIR REQUESTED DAMAGES

A. Defendants Were Improperly Awarded A Double Recovery.

"The doctrine of election of remedies is a technical rule of procedure and its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong." *Angelos v. First Interstate Bank of Utah*, 671 P.2d 772 (Utah 1983). In the lease agreement, the parties agreed to the penalty for a hold over beyond the termination of the lease. In Paragraph 21 of the lease it states:

> If LESSEE shall hold over without the consent of the LESSOR, express or implied, then LESSEE shall be construed to be a tenant at sufferance at double the Rent herein provided prorated by the day until possession is returned to LESSOR.

R.49.

Pursuant to the Lease agreement, Rent was set at $5,000.00 per month. R.46. Defendants elected a remedy of double rents for any hold over period as opposed to any other available remedies.

In their claim for damages Defendants have requested treble damages for the period of time form November 2005 through May 2006. In their claim for supplemental damages Defendants attempt to use the unlawful detainer statute as opposed to the contract damages. Their attempt however is misplaced. In their execution of the contract Defendants specifically elected their remedy for damages if Plaintiff held over. That election was for double the regular rent rate. The total due for holdover rents is accordingly $10,000.00 per month, from the end of the lease, prorated to the time the Plaintiff left the building.

B. Defendants Are Not Entitled To Treble Damages.

Defendants were granted treble damages under the Utah Unlawful Detainer Statute. UCA §78-36-10. Subsections (2) and (3) of this section provides:

> (2) The jury or the court, if the proceeding is tried without a jury or upon the defendant's default, shall assess the damages resulting to the plaintiff from any of the following:
> (a) forcible entry;
> (b) forcible or unlawful detainer;
> (c) waste of the premises during the defendant's tenancy, if waste is alleged in te complaint and proved at trial;
> (d) the amount of rent due, if the alleged unlawful detainer is after default in the payment of rent; and
> (e) the abatement of the nuisance by eviction as provided in Sections 78-38-9 through 78-38-16.
>
> (3) The judgment shall be entered against the defendant for the rent, for three times the amount of damages assessed under Subsections (2)(a) through 2(c), and for reasonable attorneys' fees, if they are provided for in the lease or agreement.

1. Defendants have suffered no damages.

Pursuant to UCA §78-36-10 (2) damages are to be awarded where Defendants have suffered some damage as a result of an unlawful detainer. The reality here is that Defendants suffered no damage. In 2003, when Plaintiff took possession of the property, the County Assessor valued the property at $332,150.00. In 2005, after Plaintiff's improvements, the market value of the property was $982,660.00.[4] The dramatic increase in the property's value, because of Mr. Truong's improvements, highlights Defendants' unwillingness to go through with the sale and clearly demonstrates they have suffered no damages.

2. Rent damages are not subject to trebling.

Under the plain language of the statute "rent" is not to be trebled. UCA §78-36-10(3). Rent in this case began with the inception of the lease and terminated at the earlier of (a) the time of the Judgment being entered, (b) termination of the lease (UCA§ 78-36-10 (1)) or Plaintiff's surrender of the premises to Defendants. Since the surrender took place prior to the Court's order, only rents, not damages, have accrued.

[4] A copy of the County tax records showing market value for 2003 and 2005 are attached as Exhibit "D" to Defendants' Memorandum in Support of Summary judgment on Supplemental Damages. R. 800.

As set forth in the express language of the statute, rent is not an item of damage that can be trebled. *Forrester v. Cook*, 292 P. 206, 214 (Utah 1930). Since the lease agreement covered a two year period and provided a set amount for rents for any holdover period, there can be no trebling of rents. [5]

C. Defendants Are Not Entitled To Their Claimed Interest.

Defendants were awarded interest on unpaid rents from 10/1/04 to 7/31/05 and on purported hold over rents from that time forward. Defendants are claiming interest under UCA §15-1-1. This section "does nothing more than define what the rate of interest should be in those instances where interest accrues as a matter of law but no specific rate has been agreed to; it does not create a right to interest where none exists." *Vali Convalescent and Care Institutions v. Division of Health Care Financing*, 797 P.2d 438, 444 (Utah App. 1990). The contract does not provide for any interest. It does however provide for a specific penalty for a hold over. Such a penalty provision of a necessity contains an element of interest in its calculation.

Even if there were a legal basis for prejudgment interest on the unpaid rents, "a court can award prejudgment interest only when the loss is fixed at a particular time and the amount can be fixed with accuracy." *Smith v. Linmar Energy Corporation*, 790 P.2d 1222, 1225 (Utah App. 1990). To the extent Defendants are claiming treble damages, said amounts are only awardable upon ruling of the court. By its nature, a claim for treble damages is incomplete until the issue has been ruled on.

> *...where damages are incomplete or cannot be calculated with mathematical accuracy,* such as in the case of personal injury, wrongful death, defamation of character, false imprisonment, etc., the amount of the damages must be ascertained and assessed by the trier of fact at the trial and in such cases *prejudgment interest is not allowed.*

[5]The fair market rental value of the property might be used a measure of damages.

Id at 1226 (emphasis in original).

Defendants have been awarded interest on a principle amount greater than that allowed by law (see election of remedies argument above). They also received interest on unlawful detainer damages which are by their very nature unliquidated until entry of the Court's order awarding them, the award of such interest must therefore be reversed.

D. Defendants Are Not Entitled To Their Claimed Attorney Fees.

The trial court awarded Defendants $42, 695.01 in attorney fees. There is insufficient evidence to establish the reasonableness, recoverability or necessity of those fees.

"Attorney fees are awarded only when authorized by statute or by contract." *Paul DeGroot Bldg. Servs., L.L.C. v. Gallacher*, 112 P.3d 490 (Utah 2005). Accordingly it behooves the party requesting the fees to provide a break down on what fees are purportedly being recovered under which method.

In *Jensen v. Sawyers*, 130 P.3d 325 (Utah 2005) the Utah Supreme Court upheld the denial of an award for attorney fees to a prevailing party where the party failed to adequately separate noncompensable and compensable claims. *Jensen* at 349. The Court cited with approval *Foote v. Clarke*, 962 P.2d 52,54 (Utah 1998) stating:

> Further, the party requesting the attorney fees must categorize the time and fees expended for (1) successful claims for which there may be an entitlement of attorney fees, (2) unsuccessful claims for which there may be an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees.

Jensen at 349.

In Defendants fees break down they list gross amounts and billing dates, but fail to indicate what work was performed to justify such billings. Even a cursory examination of the facts of this case demonstrate however that the amount of the fees exceed those recoverable. In the second affidavit of Bruce Holmes he states in paragraph 8 that a notice to quit or pay rent was served on or after August 9, 2005. Since such a notice is a prerequisite to any action for unlawful detainer, no attorney fees, unrelated to that notice would have been awardable under the unlawful detainer statute until after that date. Defendant is seeking fees also under the lease agreement. However, no claim was made for a breach of the lease prior to the filing of the Answer and Counterclaim on August 26, 2005. Fees incurred prior to that date were for defending against Plaintiffs claims raised under the option agreement. The option agreement does not contain an attorney fees provision.

Even if we were to presume that all of the fees post July were in some fashion covered by either the Statute or the Lease Agreement, which would not be appropriate as clearly a significant portion must have gone to defeating the new claims under the option brought in the amended complaint, that still leaves a minimum of $12,756.00 in fees purportedly incurred on issues where no fees are recoverable.

In light of Defendants failure to properly set forth the fees actually recoverable and/or to provide sufficient detail to allow the court to make such a determination all such fees should be denied.

E. Plaintiff Is Entitled To Credit For His Security Deposit.

It is undisputed that Plaintiff paid to the Defendants a "security deposit" of $30,000.00. Defendants however have failed to give Plaintiff credit for this $30,000.00. Applying the deposit at the outset of the alleged default would provide sufficient rents for a six month period under the original lease or at a minimum for three months under the hold over provisions. It would likewise impact the award of any prejudgment interest.

To fail to account for the $30,000.00 deposit is to award the Defendants a double recovery.

CONCLUSION

In order to defeat a motion to dismiss, a Plaintiff needs only to show that could recover under some set of the plead facts. That de minimus threshold was easily reached in this case. The grant of Defendants' motion to Dismiss was accordingly in error.

The Counterclaim relies entirely on the dismissal of the complaint as a condition precedent to its viability. Since the motion to dismiss was improper, the grant of summary judgment was likewise improper.

Additionally, as shown above, there are numerous issues of material fact which are in dispute. It only requires the existence of one such fact to preclude the grant of summary judgment. Accordingly the summary judgment should be vacated.

Finally, the trial courts award of damages is excessive both as to actual damages and as to interest and fees. With the reversal of the summary judgment, this issue

becomes somewhat moot. If however the judgment were upheld, The plaintiff respectfully requests any award be adjusted according to the argument above.

DATED this 18th day of November , 2008

LARSON, TURNER, DALBY & ETHINGTON

_____
Shawn D. Turner

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2008 a true and correct copy of **Brief of Appellant** and an accompanying searchable electronic copy was mailed, postage prepaid, to the following:

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_____

IN THE COURT OF APPEALS
STATE OF UTAH

DAVID TRUONG, an Individual Plaintiff, Appellant v. BRUCE E. HOLMES, an individual, JOAN W. HOLMES, an individual, JOHN DOES 1-5; Defendants, Appellees	**BRIEF OF APPELLANT** Appellate No. 20080385-CA Civil No. 040920717 Judge Denise P. Lindberg

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LIST OF PARTIES

THE CAPTION OF THE CASE CONTAINS THE NAMES OF ALL PARTIES

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